Nos. 82-1630 and 82-6695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TED S. HUDSON,

Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,

Respondent.

and

RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

v.

TED S. HUDSON,

Cross-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT AND CROSS-PETITIONER

DEBORAH C. WYATT*
JOHN O. WHEELER
917 East Jefferson Street
Charlottesville, Virginia 22901
(804) 296-4138
Attorneys for Respondent and Cross-Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I.

Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?[1]

II.

If the Fourth Amendment provides no reasonable expectation of privacy, may such an expectation be found in the general terms of the Fourteenth Amendment?

III.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation notwithstanding the existence of state remedies?

IV.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation when state relief is uncertain?

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[1] The Question Presented in the Petition for Writ of Certiorari was inaccurate in describing the search in this case as having been "for security purposes." This error was corrected by Petitioner in his Brief on Behalf of Petitioner, and the Question set forth above reflects this change.

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BRIEF FOR RESPONDENT AND CROSS-PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Western District of Virginia, Abingdon Division, entered November 17, 1981, is not reported and is included in the Joint Appendix at pages 28-34. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued January 6, 1983, is reported as *Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1983), and a copy appears at pages 36-44 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTE INVOLVED

Title 42 U.S.C. § 1983 [hereinafter also § 1983] provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 28, 1981, Russell Palmer, Respondent and Cross-Petitioner [hereinafter also referred to as Respondent], brought a § 1983 suit against Ted S. Hudson, Petitioner and Cross-Respondent [hereinafter also referred to as Petitioner]. (App-6-10). Hudson was a guard at the prison in which Respondent Palmer was incarcerated. Palmer alleged that Petitioner Hudson conducted a destructive search of Palmer's room and locker for no purpose other than to harass and that during the search, Hudson destroyed Palmer's noncontraband personal property, including legal papers. (App-6-7 & 20-22). The value of the property was not alleged and is neither established nor suggested in the record. Palmer also alleged other forms of harassment by Hudson. (App-20-22).

On November 17, 1981, the United States District Court for the Western District of Virginia entered summary judgment against Palmer. In so doing, the district court accepted Palmer's allegations as true but held that the allegations failed to state a constitutional violation. (App-28-34).

Palmer timely appealed to the Fourth Circuit Court of Appeals, and the court of appeals appointed counsel for briefing and argument. On January 6, 1983, the court held that the intentional destruction of property for harassment did not violate due process assuming the existence of state tort remedies. The court further held that the allegation of a search and seizure for no purpose but to harass stated a possible Fourth Amendment violation, (App-36-44), and remanded the case to the district court.

On April 5, 1983, Hudson petitioned this Court for a Writ of Certiorari on the Fourth Amendment claim. On May 4, 1983, Palmer filed a Cross-Petition on the due process claim. On June 27, 1983, the Court granted a Writ of Certiorari as to all questions, together with leave for Palmer to proceed *in forma pauperis*.

SUMMARY OF ARGUMENT

When an official intentionally takes property, he must either have predeprivation authority or else have a legitimate excuse for the failure to acquire predeprivation authority. Because Petitioner Hudson had neither, the taking of Respondent Palmer's property violated due process whether or not state tort remedies were available. Further, even if the existence of state tort remedies were relevant to the due process determination in this case, postdeprivation relief in Virginia is uncertain, as the doctrine of sovereign immunity in Virginia forecloses many suits against state officials.

Furthermore, an intentional taking of an inmate's property for no legitimate purpose but in a wilfull abuse of power is a governmental act qualitatively different from an accidental loss of property. Whether or not it may be characterized as a random and unauthorized act, and whatever the impracticalities of a predeprivation hear-

ing, it is the type of conduct which the due process clause, the Fourteenth Amendment, and the civil rights acts were most directly designed to deter. Such a deprivation by Petitioner Hudson therefore at once violated Respondent Palmer's due process guarantee.

In addition to the due process guarantee, Petitioner Hudson's actions violated the distinct guarantee of the Fourth Amendment. The Fourth Amendment protects all persons against unreasonable searches and seizures. While the question of what is reasonable changes with the circumstances, and prison authorities are accorded wide latitude for the legitimate purpose of prison security, the search of an inmate's room and locker and destruction of his noncontraband property for the sole purpose to harass cannot be viewed as reasonable and thus violates the Fourth Amendment.[2]

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[2] Petitioner has addressed two additional questions: 1) whether the Fourth Circuit improperly placed the burden of proof; and 2) whether there is some privacy protection applicable to this case in addition to and apart from that provided by the Fourth Amendment as made applicable to the states by the Fourteenth Amendment.

The first of these questions was not presented to this Court in the Petition for Writ of Certiorari. Accordingly, Respondent will not address it except as it may pertain to the issues before the Court.

The second question, although contained in the Petition for Writ of Certiorari, is also not present in this case. Although Petitioner discusses the citation by the court of appeals of *Delaware* v. *Prouse*, 440 U.S. 648 (1979), as indicating recognition of a privacy right of the nature of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), a contextual reading of the opinion below clarifies that the Fourth Circuit never so held.

ARGUMENT

I. PETITIONER HUDSON'S TAKING AND DESTRUCTION OF RESPONDENT PALMER'S PROPERTY VIOLATED DUE PROCESS.

A. An Official's Intentional, Unexcused Taking Of Property Without Predeprivation Process Violates Procedural Due Process Regardless Of Postdeprivation Remedies.

The due process clause of the Fourteenth Amendment guarantees that no state agent shall "deprive any person of life, liberty, or property, without due process of law. . . ."[3] This guarantee mandates predeprivation notice and opportunity to be heard. *Logan* v. *Zimmerman Brush Co.*, 445 U.S. 422, 428 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Process provided after the fact will not suffice. The taking remains unconstitutional because it was committed without authority of law.

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact

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[3] Property has never been slighted by this clause in deference to the other interests. To the contrary, property rights have been preeminent in the history of the due process clause. *See* G. DIETZE, IN DEFENSE OF PROPERTY (1963); *cf. Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 236 (1897) (recognizing that without protection of property all other rights would become worthless).

> that an arbitrary taking that was subject to the right of procedural due process has already occurred.

Fuentes v. *Shevin*, 407 U.S. 67, 81-82 (1972).[4]

This Court has recognized certain limited circumstances in which the government could not or should not be required to hold a hearing prior to the deprivation. *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

> These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process.

Id. at 539. Thus, no predeprivation hearing has been required in the case of an emergency involving public health, safety, or welfare. *See, e.g., North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizing unwholesome food). Similarly, this Court has held that no predeprivation hearing is required when the "taking" is accidental and thus involves no actual decision to seize which could have been altered. *See Parratt* v. *Taylor*.

In determining the exceptions to the general prohibition against property seizure without previously obtained authority, the Court has undertaken a balancing of interests. In *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), this Court set forth the factors to be considered: 1) the private interest at stake; 2) the risk of erroneous deprivation and the value of additional procedures; and 3) the governmental interest at stake.

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[4] It is settled that this guarantee applies to those in as well as out of penal institutions. *See Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

At times one or two factors alone can so tip the scales as to be dispositive. For example, in *Parratt*, the complete inability to achieve better results via predeprivation procedures together with the availability of state remedies compelled the conclusion reached in that case. Similarly in the present case, two of these factors are immediately dispositive. Petitioner seized and destroyed Respondent Palmer's personal, noncontraband property for no purpose but to harass. The interest of the government in such illegitimate, abusive seizures of property as in the present case is nonexistent. And the risk of erroneous deprivation can only be seen as approaching one hundred percent. Thus, whatever the value of Respondent's property, no exception to the ordinary due process guarantee can be justified under the *Mathews* v. *Eldridge* analysis and the summary deprivation by Petitioner Hudson violated due process.[5]

Because a guard bent on abusing his power will most likely not seek predeprivation authority for that abuse and harassment,[6] it might be argued that a requirement

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[5] Respondent Palmer readily recognizes that prison authorities are accorded a wide degree of latitude for the legitimate purpose of prison security. In his *pro se* complaint, he pleaded as follows: "Plaintiff realizes that routine shakedowns are necessary to properly run a prison, but he also knows they should not be used as harassment and retaliation." (App-21). Thus, were this case to involve contraband rather than legal, personal property, the analysis would be altogether different. In such a case, a guard would most likely have preestablished authority to seize. Moreover, a prisoner's legitimate interest would be absent while the government's interest in immediate seizure might be strong indeed.

[6] Presumably, a guard could acquire no valid authority for a purely harassing seizure of property. Thus requiring this step would be of enormous value in preventing the problem and achieving the result foreseen and intended by the due process clause. If, on the other

of predeprivation process is as impracticable in such a case as in the case of an accidental loss. However, this is not so. Because an officer in such a situation *can* provide predeprivation process, then as a matter of due process he must do so. If he declines, he acts at once unconstitutionally. The bad faith cannot be a factor allowed to render constitutional that which would be unconstitutional without it. *Screws* v. *United States*, 325 U.S. 91, 114 (1945) (Rutledge, J., concurring).[7]

Accordingly, the deliberate seizure by Petitioner Hudson of Respondent Palmer's property violated due process *despite the availability of postdeprivation remedies*. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436. The due process violation was complete in the taking. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes* v. *Shevin*, 407 U.S. at 82 (quotation omitted). Such remedies only become relevant once it has been concluded that summary deprivation is excusable for a legitimate purpose. Because no legitimate purpose could excuse the summary deprivation in this case, the question of postdeprivation remedies is never reached.

Neither *Ingraham* v. *Wright*, 430 U.S. 651 (1977), nor *Parratt* v. *Taylor*, 451 U.S. 527 (1981), stand for any

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hand, authority were granted for a harassment seizure, the problem would then lie with the source of that authority. *Cf. Bonner* v. *Coughlin*, 517 F. 2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) (prison officials asserted in defense a procedure which they claimed allowed the actions there under challenge).

[7] In *Screws*, involving an action under another civil rights statute, the position was urged that because the act was murder, the matter should not be considered one of due process but rather should be confined to state courts. This position was repudiated.

contrary proposition. *Ingraham* involved the highly unique coupling of issues involving punishment[8] and public school children.[9] The procedure under challenge not only fell short of implicating a fundamental prohibition or even a common law tort, but to the contrary, it had constituted "a common-law privilege." 430 U.S. at 674. The Court could hardly have made clearer the historical influence on its decision. Because of corporal punishment's historical base, the child's liberty interest in avoiding corporal punishment has been limited. *Id.* at 675. This historical framework together with the openness of the school environment and the deterrences provided by state remedies led to the conclusion that "[t]he risk that a child will be paddled without cause is typically insignificant." *Id.* at 678; *cf. Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982) (in which the system there under challenge was, by contrast, found to "present an unjustifiably high risk" of error). In light of these factors and the strong influence of history in this unique situation, due process was not violated by summary school paddlings. But the existence of state court remedies only entered the analysis in the Court's consideration of the risk of abuse and existing deterrence.

Moreover, *Ingraham's* reach quite clearly stops short of prison walls. The opinion itself says so, stating, "the

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[8] Cases questioning the degree of punishment have caused this Court considerable hesitation in other contexts. *See, e.g., Solem* v. *Helm*, 103 S. Ct. 3001 (1983).

[9] In the context of public schools, the Court has also noted deference. *See, e.g., Board of Curators of University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978); *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) (dictum) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . .", quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)).

prisoner and the schoolchild stand in wholly different circumstances. . . ." 430 U.S. at 669. Prisons are far from open. Accordingly, when the Court soon after addressed negligent deprivations of liberty in a jail context, *Ingraham* was not even cited. *See Baker* v. *McCollan*, 443 U.S. 137 (1979). In *Baker*, the question of the existence or not of postdeprivation remedies was, appropriately, confined to the status of speculation in dictum, since predeprivation process had been provided, albeit erroneously, through the warrant process. *Id.* at 142. Subsequently, in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), the Court cited *Ingraham*, but only for the proposition that, "at some point the benefit of an additional safeguard to the individual affected . . . may be outweighed by the cost." 451 U.S. at 542-43 (quotations omitted). In *Parratt*, after concluding that no predeprivation authority could be required of a government in the case of an accidental loss, the Court then and only then, consistent with due process analysis, addressed the fact that the state of Nebraska presented completely adequate postdeprivation remedies for such a loss. 451 U.S. at 543-44.

Because in the present case there was an intentional, deliberate taking, a taking which involved a determination unlike the situation in *Parratt*, and because there was no legitimate justification for the taking without predeprivation process, the procedural due process guarantee of the Fourteenth Amendment was violated notwithstanding the existence of state remedies.[10]

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[10] It is certainly not true that a postdeprivation remedy as by suit for tort would necessarily compensate Respondent Palmer fully for his property loss any more than it could compensate him for lost days if unjustly imprisoned. The record reveals that, among the items taken, were Respondents's legal papers. (App-7 & 21). These may

B. Even If The Availability Of State Lawsuits Constitutes Due Process For Purposes Of An Official's Intentional Taking, Virginia Provides No Certain State Tort Remedy Against Officers For Losses They Cause.

This Court has recognized, *see Parratt* v. *Taylor*, 451 U.S. 527 (1981), that adequate state tort remedies may constitute postdeprivation process sufficient to meet the guarantees of the Fourteenth Amendment where there can be no predeprivation process.[11] However, in Virginia such relief is far from certain and complete.[12] Instead, the interpretations and applications of sovereign immunity, a doctrine not codified, are highly confused.

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have contained things irreplacable, and incompensable. They may have indirectly had a bearing on the duration of his loss of liberty. The property may also have involved sentimental items which are of equally intangible value. *See Bonner* v. *Coughlin*, 517 F. 2d 1311, 1314 (7th Cir. 1975) (discussing that the deprivation of legal documents could affect one's status as a prisoner and recognizing that prisoners may value items out of proportion to their actual price). Further, this Court has already recognized the injury from a due process violation itself as distinguishable from damages. *See Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972).

[11] This Court has recently noted that state tort law remedies are weak substitutes for predeprivation due process. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982). When it is considered that filing fees and service costs are generally required and that counsel is not generally available for those unable to hire counsel, *but cf.* VA. CODE ANN. § 14.1-183 (1978 Repl. Vol.) (granting the right to proceed *in forma pauperis* to those who qualify and have resided in the Commonwealth for six months), such state tort remedies become weak substitutes indeed. This conclusion is further compelled by the fact that a plaintiff in such a suit has the burden of proof. *See, e.g., Bedget* v. *Lewin*, 202 Va. 535, 118 S.E.2d 650 (1961).

[12] Section 8.01-195.1 *et seq.* of the Code of Virginia, enacted in 1982, does not remove sovereign immunity. Rather, it only abolishes to a limited degree the state's immunity while explicitly preserving the common law immunities of the government officials. Furthermore, it

In the recent case of *James* v. *Jane*, 221 Va. 43, 267 S.E. 2d 108 (1980), for example, the Virginia Supreme Court held that certain doctors at a state hospital were not immune from suit for their negligence. This conflicted with the earlier decision of *Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973), which granted immunity from malpractice suits to a hospital administrator and intern because of their discretionary functions. This conflict resulted in a rare dissent by two justices who called for the overruling of *Lawhorne* v. *Harlan*. Yet *Lawhorne* was subsequently relied upon in *Banks* v. *Seller*, 224 Va. 168, 294 S.E.2d 862 (1982). There, because the duties of a school superintendent and principal involved a "considerable degree of judgment and discretion," *id.* at 173, 294 S.E. 2d at 865, the officers were immune from suit. This time three of the seven justices dissented on the basis that *Lawhorne* could not be reconciled with other decisions of the court. More recently, the court decided *First Virginia Bank-Colonial* v. *Baker, Clerk*, 225 Va. ____, 301 S.E. 2d 8 (1983). With a paucity of discussion, the court held that while a clerk is entitled to sovereign immunity for his discretionary acts, he is not immune on the basis of *respondent superior* for the acts of his deputy whether discretionary or ministerial.

Most recently, the court decided *Bowers* v. *Department of Highways*, 225 Va. ____, 302 S.E.2d 511 (1983). The court allowed the defendant in *Bowers* sovereign immunity from a suit for injuries caused by the defend-

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explicitly does not apply to claims accruing prior to 1982, and hence does not apply to this case. *See* VA. CODE ANN. § 8.01-195.1 *et seq.* (1983 Cum. Supp.). Virginia has obtained approval, as of December 14, 1982, of a plan pursuant to 42 U.S.C. § 1997(e) (Institutionalized Persons Act). That administrative plan does provide the possibility for a limited damage remedy for loss of property by prisoners.

ant's unauthorized work on the plaintiff's property. Again three justices dissented. Again the dissent pointed out that the case was irreconcilable with previous decisions. They stated, "This tendency of the majority to tiptoe around the fringes of sovereign immunity not only produces highly attenuated reasoning but leads to increasing uncertainty and confusion in the trial courts." 225 Va. at ____, 301 S.E. 2d at 516.

The only Virginia case to hold directly on the issue of sovereign immunity from intentional torts is *Elder* v. *Holland*, 208 Va. 15, 155 S.E. 2d 369 (1967), involving a claim of defamation in testimony. The language of the holding was simply the following:

> Having concluded that a State employee may [under certain circumstances] be held liable for negligent conduct, we must conclude that a State employee may be held liable for his intentional torts.

208 Va. at 19, 155 S.E. 2d at 372-73. This case has been cited for the proposition that there is no sovereign immunity for intentional torts.[13] However, whether the phrase "may be held liable" could have meant, as it did in the court's preceding reference to negligent conduct, only the possibility of liability under certain circumstances rather than a blanket rule is unknown. The court did proceed to grant the defendant a qualified immunity in the absence of a strong showing of actual malice.

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[13] A number of lower federal courts, including the district court in this case, have interpreted Virginia law as having no sovereign immunity for intentional torts. *See, e.g., Frazier* v. *Collins*, 538 F. Supp. 603 (E.D. Va. 1982); *Whorley* v. *Karr*, 534 F. Supp. 88 (W.D.Va. 1981); *Daughtry* v. *Arlington County, Va.*, 490 F. Supp. 307 (D.D.C. 1980). These cases have relied on *Elder* v. *Holland* for this proposition.

While it is possible if not probable that a Virginia trial court would rule that there should be no immunity bar in the present case, such an outcome is simply uncertain, and any contrary ruling would have little chance of reversal because of the absence of an appeal of right in Virginia. Moreover, as discussed, the law is even more uncertain in the realm of negligent acts. Accordingly, in the Commonwealth of Virginia, state tort law remedies cannot be relied upon to provide adequate postdeprivation process.[14]

C. The Due Process Clause Of The Fourteenth Amendment Protects Against Deprivations By Abuse Of Official Power.

The principle that persons should be protected from arbitrary and abusive governmental action is the cornerstone of free society. It lies at the very heart of the Fourteenth Amendment's due process guarantee, *see*,

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[14] As Justice Powell noted in *Parratt* v. *Taylor*, 451 U.S. at 550-51, allowing the question of a due process violation to depend on the existence of state lawsuit remedies can lead to truly anomalous results. In fact, for Virginia claims, the principle of avoiding the use of § 1983 as a substitute for state tort law, *see, e.g.*, *Paul* v. *Davis*, 424 U.S. 693 (1976) (eschewing such use), is turned on its head. For in Virginia, because sovereign immunity deprives persons of fair compensation in many otherwise meritorious cases involving negligently inflicted injuries, *see Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E. 2d 569 (1973), claims which might otherwise present mere ordinary torts become due process violations. Even if the foreclosure of state tort remedies by immunity doctrines and other defenses does not alone constitute a due process violation, *see Martinez* v. *California*, 444 U.S. 277 (1980), certainly such doctrines remove the last vestige of apparent due process sufficiency where a state deprives one of property without preseizure authority.

An analysis of Virginia law also leads to the anomalous due process result that negligent deprivations such as by medical malpractice

e.g., *Home Telephone and Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), as it does of the civil rights acts provided to enforce that guarantee, *Monroe* v. *Pape*, 365 U.S. 167 (1961).

> [T]he [Fourteenth] Amendment, looking to the prevention . . . of the wrongs which it prohibits, proceeds . . . upon the assumption that . . . state powers might be abused by those who possessed them, and as a result might be used as the instrument for doing wrongs. . . .

Home Telegraph and Telegraph Co. v. *Los Angeles*, 227 U.S. at 288. Thus, "protection of the individual against arbitrary action of the government" is the "touchstone of due process." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974); *cf. Kolender* v. *Lawson*, 103 S. Ct. 1855, 1859 (1983) (vague statute enabling arbitrary use of power held unconstitutional).

This guarantee, so fundamental that it is the only guarantee of the Bill of Rights not left to implication in the Fourteenth Amendment, stems from no less a source than the Magna Carta, *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819); A. HOWARD, THE ROAD FROM RUNNYMEDE (1968). Its protection is the core of ordered liberty.

> A government which recognized no such rights [against arbitrary and capricious power], which held

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would be more likely to violate due process because of the immunity protecting such acts of state employees, *see Lawhorne* v. *Harlan*, whereas intentional acts such as those involved in *Screws* v. *United States*, 325 U.S. 91 (1945), would less violate the federal Fourteenth Amendment guarantee of due process because Virginia would be more likely to provide a remedy without an immunity bar, *see Elder* v. *Holland*. Of course, this very result was addressed and repudiated by a majority of the Court in *Screws* as well as in *Monroe* v. *Pape*, 365 U.S. 167 (1961).

> the lives, the liberty, and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority . . . but it is none the less a despotism.

Loan Association v. *Topeka*, 20 Wall. (87 U.S.) 655, 662 (1874). Thus, this principle easily meets the test of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937) (quotation omitted), and partakes of the substantive nature of the guarantees intended by the Fourteenth Amendment.

Because of the close connection between the civil rights acts and the guarantees of the Fourteenth Amendment which the acts were designed to enforce, this principle that persons should be free from deprivations as a result of a state official's abuse of power has often been addressed in terms of the purpose of § 1983. *See, e.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961). However, § 1983 is but a remedy for the violation of those rights guaranteed by the Constitution or by statute. *E.g.*, *Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982). Thus, this Court's recognition that the civil rights acts were aimed specifically at abuse of power, *see, e.g.*, *Briscoe* v. *Lahue*, 103 S. Ct. 1108 (1983) (dictum); *Monroe* v. *Pape; Screws* v. *United States*, 325 U.S. 91 (1945) (majority of the Court), necessarily subsumed this principle within the Fourteenth Amendment.

Recognition that federal courts are charged with the duty of preventing through § 1983 abuses of state power as violative of federal constitutional guarantees was most notably canvassed in the watershed decision of *Monroe* v. *Pape*, 365 U.S. 167 (1961). *Monroe* involved random and

unauthorized abuses[15] by thirteen Chicago policemen. More specifically,

> [t]he complaint allege[d] that 13 Chicago police officers broke into petitioner's home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.

Id. at 169. The question was squarely put: "whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights . . . by an official's abuse of his position." It was as squarely answered: "We conclude that it did so intend." *Id.* at 172.

Monroe solidified the principle that federal courts are guardians against abuses of power by state officials.

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is

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[15] Neither *Ingraham* v. *Wright*, 430 U.S. 651 (1977), nor *Parratt* v. *Taylor*, 451 U.S. 527 (1981), involved claims challenging directly an abuse of power. In *Ingraham*, no teachers were defendants; in *Parratt*, the culprit, if any, was unknown. A random and unauthorized abuse of power does not necessarily render a procedure unconstitutional if the risk of abuse is low and the procedure otherwise satisfactory. *Compare Ingraham* v. *Wright* (low risk of abuse) *with Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982) ("an unjustifiably high risk" of error). *See generally Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982) (recognizing the distinction between claims against procedures and those against persons misusing procedures).

> supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Id. at 183; *accord Patsy* v. *Board of Regents*, 102 S. Ct. 2557 (1982).[16]

Recognition of this principle was, of course, established not long after the passage of the Fourteenth Amendment, *see, e.g., Ex Parte Virginia*, 100 U.S. 339, 346-47 (1880), and had been applied in cases preceding *Monroe*. *Screws* v. *United States*, 325 U.S. 91 (1945), for example, likewise involved a random and unauthorized act, the beating to death of a black man by police officers. A majority of the Court concluded that *the beating violated "the right not to be deprived of life without due process of law"*. *Id.* at 93. This was so whether or not a predeprivation hearing could have realistically been expected. In fact, the question never entered the analysis. The state officers argued that, because the act constituted murder under state law, and thus there was a state remedy for the act, the abuse of power should not implicate any federal guarantee. *Id.* at 114. Justice Rutledge put this argument in proper prospective. He stated in concurrence:

> In effect, the position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's

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[16] While in *Monroe* v. *Pape*, as in the present case, abusive action may at times also implicate the Fourth Amendment, it will not always do so. The withholding of entitlements, for example, for an abusive purpose might implicate the due process clause but not the Fourth Amendment. *Cf. Hewitt* v. *Helms*, 103 S. Ct. 864 (1983) (acknowledging a prisoner's due process liberty guarantee as distinct from a Fourth Amendment guarantee).

> laws, the nation cannot reach their conduct. . . . This, though the prime object of the Fourteenth Amendment and [the civil rights act] was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

Id. (footnote omitted). As he then pointed out, such an argument had been long rejected. "The [Fourteenth] Amendment and the [civil rights] legislation were not aimed at rightful state action. *Abuse of state power was the target.*" *Id.* at 115 (emphasis added).

The concept that persons should be free from abuse of power as guaranteed by the due process clause and enforced by § 1983 has reverberated through many recent decisions of this Court, *see, e.g., Baker* v. *McCollan*, 443 U.S. 137 (1979) (concurring and dissenting opinions); *Parratt* v. *Taylor*, 451 U.S. 527 (1981) (concurring opinions), and has been explicitly acknowledged in others, *see e.g., Briscoe* v. *Lahue*, 103 S. Ct. 1108, 1118 (1983) (dictum) (that § 1983 is "a section designed to provide remedies for abuses under color of law.").[17]

In *Parratt* v. *Taylor*, for example, numerous separate opinions were inspired by the absence of an intentional taking. Three Justices specifically addressed the fact that "there are certain governmental actions that, *even if undertaken with a full panoply of procedural protections*, are, in and of themselves, antithetical to fundamental notions of due process." 451 U.S. at 545 (Blackmun, J., joined by White, J., concurring) (emphasis added). Justice Powell explained further, "The Due Process Clause imposes substantive limitations on state action,

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[17] This concept, though in other form, is inherent in decisions addressing qualified, "good faith" immunity. *See, e.g., Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property. . . ." *Id.* at 552-53 (Powell, J., concurring). This limitation stems from the fact that the Constitution protects against deprivations "by a state officer *who takes . . . by abuse of his office and its power.*" *Id.* (quoting *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring)) (emphasis by Powell, J.); *cf. Carlson* v. *Green*, 446 U.S. 14 (1980) (recognizing the importance of deterring abuses of power through a "*Bivens*" action).[18]

Thus, whether considered a matter of substance or procedure, the due process clause, in conjunction with the civil rights legislation designed to enforce the Fourteenth Amendment, protect a citizen from deprivation of life, liberty, or property by an official abusing his power. The Fourteenth Amendment and § 1983 protect him as fully against such abuse as it protects his right of privacy, *see Griswold* v. *Connecticut*, 381 U.S. 479 (1965), his access to the courts, *see Bounds* v. *Smith*, 430 U.S. 817 (1977), and other fundamental rights. Because without this protection all other rights may be abused, it is perhaps the most fundamental protection of all.[19]

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[18] In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the Court allowed an action against federal officers similar to an action under § 1983 even though § 1983 was itself inapplicable to the federal officials.

[19] Most scholars appear to agree that federal courts ought to maintain power over abuses by state officials. *See, e.g.*, Friedman, *Parratt* v. *Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L. Q. 545 (1982); Note, *Defining the Parameters of Section 1983: Parratt* v. *Taylor*, 23 B. C. L. REV. 1219 (1982); Note, *Due Process and Section 1983: Limiting Parratt* v. *Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253 (1983).

In the present case, Petitioner Hudson deprived Respondent Palmer of his personal, noncontraband property for no legitimate purpose. He sought only to harass, which he was able to do by virtue of his position and its power. He thus abused his power and in so doing denied Respondent Palmer of the right to have due process prior to losing his property and, by the very nature of the act, violated the due process clause of the Fourteenth Amendment.

II. PETITIONER HUDSON'S TAKING AND DESTRUCTION OF RESPONDENT PALMER'S PROPERTY VIOLATED THE FOURTH AMENDMENT

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), this Court observed that there is "no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. Earlier in the same term, the Court recognized that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405-06 (1974).

While constitutional guarantees apply in and out of prison, the Constitution creates few interests which are absolute. *See, e.g., Pell* v. *Procunier*, 417 U.S. 817 (1974) (press interviews prevented in prison); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words exemption to free speech). The Fourth Amendment is no exception. It protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV. The guarantee, made applicable to the states through the Fourteenth Amendment, *e.g., Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and applying to all "people", only addresses searches and seizures which are unreasonable.

"[A]nalysis under the Fourth Amendment is always the reasonableness in all the circumstances of a particular governmental invasion of a citizen's personal security." *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (quotations omitted); *accord Florida* v. *Royer*, 103 S. Ct. 1319 (1983) (all opinions). In turn, "[r]easonableness . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference. . . ." *Pennsylvania* v. *Mimms*, 434 U.S. at 109 (quotation omitted); *accord Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979).

It follows therefore that when a person is lawfully arrested his privacy interest "is subordinated to [the] legitimate and overriding governmental concern [of law enforcement]." *United States* v. *Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring). Similarly, when a person is legally incarcerated, his privacy interest and the extent of his protection against searches and seizures lessen. But this is not so because jails or prisons are places unprotected. *Katz* v. *United States*, 389 U.S. 347 (1967) (overruling *Olmstead* v. *United States*, 277 U.S. 438 (1928), in which Fourth Amendment guarantees were based on physical location). The Constitution protects people, not places. *Id.* Rather, this is so because prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U.S. at 549; *accord Hewitt* v. *Helms*, 103 S. Ct. 864 (1983).

Consequently, the range of searches and seizures which are reasonable for purposes of the Fourth Amendment prohibition increases dramatically in a prison setting, and a prisoner's reasonable expectation of privacy in

his cell, locker, personal effects is proportionately reduced. Irregular, unannounced shakedowns may be permissible. *Bell* v. *Wolfish* at 555-57. Even body cavity searches without probable cause may be reasonable. *Id.* Yet because they are reasonable, such expansive searches and seizures are permitted *within* the framework of the Fourth Amendment, not in derogation of it.

While the range of acts which might be considered reasonable for the sake of prison security may be quite broad, it does not entirely command the field: a prisoner remains protected against searches and seizures which are *unreasonable*. *Stroud* v. *United States*, 251 U.S. 15 (1919) (by necessary implication); *cf. United States* v. *Edwards*, 415 U.S. 800, 808 n.9 (1974) (dictum) (for pretrial detainees); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) (a prisoner retains those First Amendment rights which are not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections systems.")[20]

In the present case, Petitioner Hudson conducted a ransacking search of Respondent's room and locker and destroyed Respondent's personal, noncontraband property. (App-7-8, 21, & 29). He did so for no legitimate

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[20] Most circuits appear to agree. *See United States* v. *Hinckley*, 672 F. 2d 115 (D.C. Cir. 1982); *United States* v. *Lilly*, 576 F. 2d 1240 (5th Cir. 1978); *United States* v. *Stumes*, 549 F. 2d 831 (8th Cir. 1977); *Sostre* v. *Preiser*, 519 F. 2d 763 (2d Cir. 1975); *Bonner* v. *Coughlin*, 517 F. 2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F. 2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978); *United States* v. *Savage*, 482 F. 2d 1371 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Daughtery* v. *Harris*, 476 F. 2d 292 (10th Cir. 1973), *cert. denied*, 414 U.S. 872 (1973). *But see Christman* v. *Skinner*, 468 F. 2d 723 (2d Cir. 1972); *United States* v. *Hitchcock*, 467 F. 2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

purpose but only to harass Respondent. If any search and seizure in prison can be deemed unreasonable, this is it. In order to be reasonable, a search and seizure must "serve[ ] legitimate governmental interests that outweigh[ ] the individual's privacy interests. . . ." *Illinois* v. *Lafayette*, 103 S. Ct. 2605, 2610 (1983). Because a seizure designed only to upset Respondent serves no legitimate purpose, then whatever can be said of the reasonableness of security searches in prisons without warrants, shakedowns without probable cause, even body cavity searches without probable cause, the search and seizure in this case was unreasonable. From such abuses, if only from such abuses, the Fourth Amendment protects.

Nor does analysis under the rubric of expectations of privacy lead to a contrary conclusion concerning continued Fourth Amendment protection in prison. Because one's expectation of privacy is viewed objectively, rather than subjectively, *see Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *United States* v. *Dionisio*, 410 U.S. 1, 14-15 (1973), the question of one's expectation of privacy is but the opposite side of the question of reasonableness of the intrusion. *See* Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045, 1058-63 (1976), *cited in Palmer* v. *Hudson*, 697 F. 2d 1220, 1224 n. 4 (4th Cir. 1983). If random cell searches for contraband are clearly reasonable, a prisoner cannot have an objective privacy interest which would be infringed thereby. However, because searches and seizures to harass are unreasonable, a prisoner has a reasonable expectation of privacy not to have his cell, locker, personal effects, person invaded for such a purpose.

Because the search and seizure in this case was so clearly unreasonable, Petitioner's only position can be —

and is — that there is indeed an "iron curtain" around prisons. Petitioner advocates a "bright line" approach. Brief on Behalf of Petitioner at 14. He thus invites the Court to discard its previous endeavors at the more subtle, albeit more difficult, balancing of constitutional protections and governmental interests in favor of a blanket ban on this fundamental protection against unreasonableness for those in prison. While such a line may be bright indeed for an abusive prison guard, it would certainly be less so for his prisoners.

More importantly, this Court has already declined this offer. Though "straightforward rule[s]" are desirable, *New York* v. *Belton*, 453 U.S. 454, 459 (1981), any straightforward exceptions to the normal probable cause, warrant requirements are "jealously and carefully drawn". *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *accord Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967); *Florida* v. *Royer*, 103 S. Ct. 1319 (1983) (plurality). A guiding rule is a far cry from banishment of Fourth Amendment protection altogether, and a balancing of interests with reasonableness as the polestar remains the basis of Fourth Amendment analysis. *See, e.g., Florida* v. *Royer*.

Further, as early as 1919, the Court, in *Stroud* v. *United States*, 251 U.S. 15, appropriately assumed without much ado the Fourth Amendment's application in the prison context, although the government action in that case was "reasonably designed to promote the discipline of the institution," and thus was constitutional. *Id.* at 21. The Court's efforts in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), if not explicitly recognizing a prisoner's Fourth Amendment interest, certainly would appear to refute any argument that this Court is willing to sweep unnecessarily broadly in such areas for the sake of simplicity. *Cf.*

United States v. *Edwards*, 415 U.S. 800, 808 n. 9 (1974) (dictum) (stating that police conduct must still meet the Fourth Amendment's reasonableness standard in post-arrest detention). Rather than a "bright line" approach,

> the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

Terry v. *Ohio*, 392 U.S. 1, 17-18 n.15 (1968).

Even if this Court were otherwise inclined and prepared to draw a "bright line" around prisons for purposes of the Fourth Amendment, the Court has recognized rehabilitation as a legitimate penological objective. *See Procunier* v. *Martinez*, 416 U.S. 396 (1974). This objective is misserved by any greater degree of degradation by lack of privacy than is necessary to serve other penological objectives, such as security. Giannelli & Gilligan, *supra*, at 1069. "Without the privacy and dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished." *Id.*

Furthermore, such a "bright line" would effectively place an entire realm of official conduct beyond the reach of federal review. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). An overriding purpose of the Fourth Amendment is to guarantee against arbitrary searches and seizures, for which reason this Court has previously condemned unfettered discretion as pertains thereto. *See, e.g., United States* v. *Ortiz*, 422 U.S. 891, 896 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973). Yet precisely such unreasonable, abusive, arbitrary searches

would be allowed without any constitutionally imposed limitation by the adoption of such a "bright line". The Constitution itself creates no such exemption from its protection, and this Court should not now read into it any such exemption but rather should adhere to the "sounder course" of recognizing the continued existence of the Fourth Amendment within prisons, though continuing to recognize that the range of reasonable conduct may broaden therein.

Accordingly, no "bright line" around prisons should now be adopted and the decision of the Fourth Circuit Court of Appeals recognizing the continued existence of the Fourth Amendment in the prison context and its possible violation in this case should be affirmed.

CONCLUSION

An official's intentional taking and destruction of a prisoner's property for no legitimate purpose but only to upset and harass violates the due process clause of the Fourteenth Amendment which protects against deprivations without predeprivation process and which protects against abuses of power.

Furthermore, an official's search of a prisoner's room and locker and destruction of his property for no legitimate purpose but only to harass is unreasonable. Thus it violates the Fourth Amendment prohibition against such searches and seizures.

Accordingly, the decision below that Petitioner's actions did not violate due process should be reversed, and

the holding that the Fourth Amendment may have been violated should be affirmed.

Respectfully submitted,

DEBORAH CHASEN WYATT*
JOHN O. WHEELER
917 East Jefferson Street
Charlottesville, Virginia 22901
(804) 296-4138
Attorneys for Respondent and Cross-Petitioner
**Counsel of Record*